86-607

No. ___

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DIAMOND SHAMROCK CORPORATION

Petitioner,

v.

JOHN HAMILTON, MARTHA FRANCIS, MORRIS A. RICHARDSON, ZINKE & TRUMBO, LTD., ROBERT M. ZINKE, and DAVID B. TRUMBO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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October 14, 1986

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QUESTIONS PRESENTED

1. (a) Does Fed. R. Civ. P. 49(b), and cases decided thereunder which hold that a party waives the inconsistency of a jury's verdict by not raising it prior to discharge of the jury, apply to a verdict which is not accompanied by special interrogatories?

(b) If so, do they permit a federal court of appeals to reverse a trial court's determination that a new trial is proper?

2. May a federal court of appeals order that a verdict, which is supported by no evidence on essential elements, be reinstated without addressing the errors raised by a party which show that the party is entitled to judgment notwithstanding the verdict?

3. Whether the Court of Appeals erred in deciding issues in one appeal which were not raised in that appeal, but which were properly raised and fully briefed only in a separate appeal?

LIST OF PARTIES AND RULE 28.1 LIST

All parties to this case are named in the caption.

Diamond Shamrock Corporation has no parent company. All of Diamond Shamrock Corporation's subsidiaries are wholly owned. The following are subsidiaries which are not wholly owned by Diamond Shamrock Corporation's wholly-owned subsidiaries: Diamond Shamrock (Africa) Pty. Ltd., Hamada Agricultural Company Limited, Industrials Chemicals (Nigeria), Dichem Limited, Sirotherm, Inc., Metal Coatings International Inc., Metal Coatings International Comercial Ltda., Dacral S.A., Nippon Dacro Shamrock Co., Ltd., Nippon C & Z Company, Ltd., Muenzing Chemie GmbH, A. L. A. Chemicals Limited, Lankro Chemicals Limited, Tongue River Holdings, Inc. Diamond Shamrock has no other affiliates or subsidiaries (except wholly owned subsidiaries).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES AND RULE 28.1 LIST	ii
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
Proceedings Below—Introduction	9
Proceedings Below—Appeal From Certified Interlocutory Order	10
Separate Appeal From Final Judgement	11
Decision Below	12
REASONS FOR GRANTING THE WRIT	
I. a. The Tenth Circuit's Decision that a Verdict Not Accompanied With Special Interrogatories Falls Within Fed. R. Civ. P. 49(b) and that a Party Waives Inconsistency in Such a Verdict is in Direct Conflict With Decisions of Other Circuits and Raises a Recurring and Important Question of Procedure Concerning Fed. R. Civ.P. 49.	14
b. The Tenth Circuit's Reversal of the Trial Court's Order Granting a New Trial is in Direct Conflict With a Decision of the Seventh Circuit and is in Conflict With Established Case Law Holding that the Trial Court Has Broad Discretion in Granting a New Trial.	19

II. The Tenth Circuit, by Deciding Issues Properly Raised and Fully Briefed Only in a Separate Appeal and by Failing to Decide Issues Raised on Appeal Pertaining to Diamond Shamrock's Entitlement to Judgment Notwithstanding the Verdict, has so far Departed From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of this Court's Power of Supervision 23

CONCLUSION 27

TABLE OF AUTHORITIES

CASES: Page

Adkins v. Adams, 152 F.2d 489 (7th Cir. 1945) 25

Aetna Casualty & Surety Co. v. Yeatts, 122 F.2d 350 (4th Cir. 1941) 20

Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 101 S. Ct. 188, 66 L. Ed.2d 193 (1980) 24

Alverez v. J. Ray McDermott & Co., 674 F.2d 1037 (5th Cir. 1982) 18

Bell v. Ralston Purina Co., 257 F.2d 31 (10th Cir. 1958) 26

Brimmer v. Union Oil Co. of California, 81 F.2d 437, 440 (10th Cir. 1936), *cert. den.*, 298 U.S. 668, 56 S. Ct. 833, 80 L. Ed. 1391 (1936) 25

Brunner v. Maritime Overseas Corp., 779 F.2d 296 (5th Cir. 1986), *cert. den.*, 106 S. Ct. 1971, 90 L. Ed.3d 655, 54 U.S.L.W. 3761 (1986) 15

Burger King Corp. v. Mason, 710 F.2d 1480 (11th Cir. 1983), *reh. den.*, 718 F.2d 115 (11th Cir. 1983), *cert. den.*, 465 U.S. 1102, 104 S. Ct. 1599, 80 L. Ed.2d 130 (1984) 16, 21

Burkett v. Moran, 410 P.2d 876 (Okl. 1965) 18

Cheney v. Moler, 285 F.2d 116 (10th Cir. 1960) 16, 17

City of Los Angeles v. Heller, 475 U.S. ___, 106 S. Ct. 1571, 89 L. Ed.2d 806, 54 U.S.L.W. 3693 (1986) 22

Community National Life Insurance Co. v. Parker Square Savings & Loan Association, 406 F.2d 603 (10th Cir. 1969) 21

Cundiff v. Washburn, 393 F.2d 505 (7th Cir. 1968) 19

Farmers' Mutual Oil Leasing Co. v. Bonneau, 110 Okl. 168, 237 P. 83, 84 (1924) 25

Fernandez v. Chardon, 681 F.2d 42, 58 (1st Cir. 1982), *aff'd., Chardon v. Fumero Soto*, 462 U.S. 650, 103 S. Ct. 2611, 77 L. Ed.2d 74 (1983) 17

Table of Authorities Continued

	Page
Fugitt v. Jones, 549 F.2d 1001 (5th Cir. 1977) ...	15, 21
Gay v. United States, 118 F.2d 160 (7th Cir. 1941)	21
Global Van lines, Inc. v. Nebeker, 541 F.2d 865, 865 (10th Cir. 1976)	18
Griffin v. Matherne, 471 F.2d 911 (5th Cir. 1973), *reh. den.*, 474 F.2d 1347 (5th Cir. 1973	17, 21
Guidry v. Kem Mfg. Co., 598 F.2d 402 (5th Cir. 1979), *reh. den.*, 604 F.2d 320 (5th Cir. 1979), *cert. den.*, 445 U.S. 929, 100 S. Ct. 1318, 63 L. Ed.2d 1318 (1980)	18
Holmes v. Wack, 464 F.2d 86 (10th Cir. 1972) ..	20
Hopkins v. Coen, 431 F.2d 1055, 1059 (6th Cir. 1970)	16, 18
Iacurci v. Lummus Co., 387 U.S. 86, 87 S. Ct. 1843, 18 L. Ed.2d 581 (1967)	20
In re Japanese Electronic Products Antitrust Litigation, 723 F.2d 238, 304 n.55 (3rd Cir. 1983), *later proc.*, 723 F.2d 319 (3rd Cir. 1983), *rev'd. on other grds., Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, ___ U.S. ___, 106 S. Ct. 1348, 89 L. Ed.2d 538, 54 U.S.L.W. 4319 (1986)	25
Indian Territory Illuminating Oil Co. v. Rosamond, 190 Okl. 46, 120 P.2d 349 (1941)	25
International Longshoremen's & Warehousemen's Union v. Hawaiian Pineapple Co., 226 F.2d 875, 881 (9th Cir. 1955), *cert. den.*, 351 U.S. 963, 76 S. Ct. 1026, 100 L. Ed. 1483 (1956)	20
Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U.S. 88, 33 S. Ct. 185, 57 L. Ed. 431 (1913)	25
Ladnier v. Murray, 769 F.2d 195 (4th Cir. 1985)	15

Table of Authorities Continued

	Page
Lansburgh & Bro., Inc. v. Clark, 75 App. D.C. 339, 127 F.2d 331, 333 (1942)	20
Malley-Duff & Associates, Inc. v. Crown Life Ins. Co., 734 F.2d 133 (3rd Cir. 1984), *cert. den.*, 105 S. Ct. 564, 83 L. Ed.2d 505, 53 U.S.L.W. 3417 (1984)	15-17
McCormick v. City of Wildwood, 439 F. Supp. 769 (D.C. N.J. 1977)	16
Mercer v. Long Mfg. N.C., Inc., 665 F.2d 61, (5th Cir. 1982), *reh. den.*, 671 F.2d 946 (5th Cir. 1982)	14, 16, 22
National Surety Co. v. Board of Education of City of Hugo, 36 Okl. 569, 129 P. 25, 27 (1912)	26
Nissho-Iwai Co. v. Occidental Crude Sales, Inc., 729 F.2d 1530 (5th Cir. 1984)	20
Plains Petroleum Corp. v. Fine, 174 Okl. 570, 51 P.2d 284 (1935)	26
Pugh v. Bluff City Excursion Co., 177 F. 399 (6th Cir. 1910).	17
Schneider v. Lockheed Aircraft Corp., 212 App. D.C. 87, 658 F.2d 835 (1981).	20
Segars v. Atlantic Coast Line Railroad Co., 286 F.2d 767 (4th Cir. 1961)	21
Spaeth v. Union Oil Co. of California, 710 F.2d 1455 (10th Cir. 1983), *later app.*, 762 F.2d 865 (10th Cir. 1985), *cert. den.*, ___ U.S. ___, 106 S. Ct. 1946, 90 L. Ed.2d 356, 54 U.S.L.W. 3729 (1986)	26
State ex rel. Commissioners of the Land Office v. Couch, 298 P.2d 452 (Okl. 1956)	25
Thompson v. City of Louisville, 362 U.S. 199, 80 S. Ct. 624, L. Ed.2d 654 (1960)	25
Turner v. "The Cabins," Tanker, Inc., 327 F. Supp. 515 (D.C. Del. 1971)	16

Table of Authorities Continued

	Page
United States v. Ft. Sill Apache Tribe of the State of Oklahoma, 205 Ct. Cl. 805, 507 F.2d 861 (1974)	23, 24
Werner v. Upjohn Co., 628 F.2d 848 (4th Cir. 1980) *cert. den.*, 449 U.S. 1980, 101 S. Ct. 862, 66 L. Ed.2d 804 (1981)	16
Witt v. Westheimer, 182 Okl. 645, 79 P.2d 250 (1938)	25
Wood v. Holiday Inns, Inc., 508 F.2d 167 (5th Cir. 1975)	16
STATUTES AND RULES:	
28 U.S.C. §1254(1)	2
28 U.S.C. §1292(b)	10, 12, 23
28 U.S.C. §1332	3
Fed. R. Civ. P. 49	2-3, 12-19
Fed. R. Civ. P. 50(b)	21
Fed. R. Civ. P. 54(b)	10-12, 23-24
Fed. R. Civ. P. 59	18, 20
MISCELLANEOUS:	
6A Moore's *Federal Practice*, Para. 59.08[1] at p. 59-81 (1985).	18

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Diamond Shamrock Corporation ("Diamond Shamrock") petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 791 F.2d 416, and is reprinted in the Appendix hereto, App. A. The orders and opinions of the United States District Court for the Western District of Oklahoma (Eubanks, D.J.) are not reported. They are reprinted in the Appendix hereto, App. B, C, D and E.

JURISDICTION

The judgment of the Court of Appeals was entered May 21, 1986. Petitioner timely requested rehearing and suggested rehearing *en banc* to the Court of Appeals, which denied both in an order dated July 16, 1986, (App. F), as corrected by an order dated July 21, 1986, (App. G), making the petition for certiorari due on October 14, 1986. This Court has jurisdiction to issue the requested writ under 28 U.S.C. §1254(1) (1983).

STATUTE INVOLVED

Fed. R. Civ. P. 49 provides:

> "RULE 49. SPECIAL VERDICTS AND INTERROGATORIES.
>
> (a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make

a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) *General Verdict Accompanied by Answer to Interrogatories.* The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for futher consideration of its answers and verdict or shall order a new trial.

STATEMENT OF THE CASE

In 1981, Petitioner instituted this damage action against Respondents Zinke & Trumbo, Ltd., Robert M. Zinke and David B. Trumbo ("Zinke & Trumbo"). The jurisdiction of the district court was invoked under 28 U.S.C. §1332 because of diversity of citizenship. Diamond Shamrock al-

leged that Zinke & Trumbo breached a joint operating agreement entered into by the parties by failing to pay their proportionate share of the drilling and completion expenses for the John Hamilton No. 1-33 gas well located in Ellis County, Oklahoma. Diamond Shamrock sought recovery of Zinke & Trumbo's share of the unpaid well costs.

Zinke & Trumbo answered, denying liability for well costs because of the alleged gross negligence on the part of Diamond Shamrock in completing the well. Zinke & Trumbo also asserted a counterclaim for damages which occurred as a result of the alleged gross negligence.[1]

Respondents John Hamilton, Martha Francis and Morris Richardson joined in Zinke & Trumbo's counterclaim, seeking damages for Diamond Shamrock's alleged negligence in the completion of the well. All Respondents have been represented by the same counsel. Hamilton and Francis are lessors under oil and gas leases owned by Diamond Shamrock. Richardson is a lessor under an oil and gas lease owned by Zinke & Trumbo.

Hamilton and Francis also counterclaimed for damages for the alleged breach of the implied covenants of their oil and gas leases to protect against drainage and to market production.

Two jury trials were held—the first in 1983 and the second in 1985. The evidence at the first trial revealed that the John Hamilton No. 1-33 Well was drilled in a 640-acre drilling and spacing unit for production from the Morrow common source of supply. The well was commenced in January, 1982, and completed in four zones of the Lower Morrow formation in September, 1982. R., Vol. VI, pp. 57, 167-69, 176-77; Vol. VII, pp. 387-88; Vol. VIII, pp. 541-43; Vol. IX, p. 773. It was completed as a shut-

[1] Zinke & Trumbo also asserted other counterclaims which are not material to the consideration of the questions presented herein.

in well awaiting a pipeline connection. R., Vol. IX, pp. 766, 771-72, 924.

During the course of the trial, Article V.A. of the operating agreement, "Designation and Responsibilities of Operator", was read to the jury. R., Vol. VI, pp. 117-18. That article designated Diamond Shamrock as operator of the unit and provided: "It shall conduct all such operations in a good and workmanlike manner, but it shall have no liability as Operator to the other parties for losses sustained or liabilities incurred, except such as may result from gross negligence or willful misconduct."

Diamond Shamrock presented evidence that the costs incurred in completing the John Hamilton No. 1-33 Well were reasonable and necessary and that they were incurred in a good and workmanlike manner. R., Vol. VI, pp. 64, 65, 176; Vol. IX, pp. 816, 921. Zinke & Trumbo contended that they were not liable for such costs because the costs were allegedly incurred in a negligent or grossly negligent manner. R., Vol. VII, pp. 317-18, 322, 407; Vol. VIII, pp. 552-53, 651-52.

Hamilton, Francis and Richardson did not testify about their counterclaim for negligence. Nor did Hamilton and Francis testify about their counterclaims for breach of the implied covenants to market and to protect against drainage. It is undisputed that Hamilton and Francis did not make any demands upon Diamond Shamrock to perform any implied covenant of their oil and gas leases. No evidence was admitted as to the terms and provisions of the oil and gas leases which Hamilton and Francis alleged that Diamond Shamrock had breached. Diamond Shamrock stipulated in the Pretrial Conference Memorandum that the oil and gas leases existed, but did not stipulate as to their terms and provisions.

The trial court overruled Diamond Shamrock's Motions for Directed Verdict. R., Vol. IX, pp. 774, 933. The causes of action were submitted to the jury.

The trial court instructed the jury in its "Statement of the Case" Instruction that Zinke & Trumbo denied they owed Diamond Shamrock any money under the operating agreement because Diamond Shamrock failed to drill and complete the well in a good and workmanlike manner. R., Vol. I, pp. 240-41. The trial court instructed the jury that Diamond Shamrock must have substantially performed its duties under the terms and conditions of the operating agreement in order to recover on its claim for well costs. Instruction No. 4, Vol. I, p. 246.

The jury was also instructed that, in order to find for Zinke & Trumbo on their claim of gross negligence, they must find that Diamond Shamrock failed to conduct its operations in a good and workmanlike manner. Instruction No. 8, R., Vol. I, p. 251. In order to find in favor of Hamilton, Francis and Richardson on their claim of negligence, the jury was required to find that Diamond Shamrock failed to exercise ordinary care in the drilling and completion of the well. Instruction No. 9, R., Vol. I, p.252.

In order to find in favor of Hamilton and Francis on their claim of breach of the implied covenant to protect against drainage, the jury was required to find that Diamond Shamrock caused substantial drainage, that they made demand upon Diamond Shamrock to protect the premises against drainage and that Diamond Shamrock delayed an unreasonable length of time in protecting the premises as demanded. Instruction No.12, R., Vol. I, pp. 266-67. In order to find in favor of Hamilton and Francis on their claim of breach of the implied covenant to market, the jury was required to find that the well was capable of producing oil or gas in paying quantities, that they made demand upon Diamond Shamrock to comply with the covenant to market, and that Diamond Shamrock failed to exercise reasonable diligence in marketing oil or gas produced from the well. Instruction No. 11, R., Vol. I, pp. 264-65.

No special interrogatories were requested or submitted to the jury. The verdict form is reprinted in the Appendix hereto, App. H. The jury returned a verdict finding in favor of Diamond Shamrock and against Zinke & Trumbo for the full amount of Zinke& Trumbo's share of unpaid well costs in the amount of $212,805.60. The jury returned a verdict against Diamond Shamrock and in favor of Zinke & Trumbo on their claim of gross negligence in the amount of $995,196.00, and in favor of Hamilton, Francis and Richardson on their claim of negligence in the amount of $971,179.00.

The jury found for Diamond Shamrock on Hamilton and Francis' claim for breach of the implied covenant to market. The jury found in favor of Hamilton and Francis on their claim of breach of implied covenant to protect against drainage and awarded actual damages of $32,499.00 and punitive damages of $1,000,000.00.

Diamond Shamrock timely filed an Alternative Motion for Judgment Notwithstanding the Verdict or For New Trial, based on several grounds. App. I. The only error regarding inconsistency in the jury's verdict alleged by Diamond Shamrock pertained only to the jury's findings in favor of Diamond Shamrock on its claim and in favor of Zinke & Trumbo on their claim of gross negligence and in favor of Hamilton, Francis and Richardson on their claim of negligence. On January 11, 1984, the trial court issued its order granting a new trial on all of the claims which were submitted to the jury, using the following language:

> "The Court, after hearing the authorities presented and the argument of counsel, finds that the Motion for Judgment Notwithstanding the Verdict should be denied and that the Motion for New Trial should be granted in all respects." App. D.

At the hearing held on Diamond Shamrock's Alternative Motion for Judgment Notwithstanding the Verdict or New Trial, Diamond Shamrock's counsel asserted several grounds in support of its Motion, including that there was no evidence to support certain essential elements of Respondents' counterclaims. Although the judge commented that he thought that the verdict was inconsistent on all claims, during the course of the arguments he stated that he believed the verdict was inconsistent only with respect to Diamond Shamrock's claim and Respondents' counterclaims for gross negligence and negligence. R., Vol. XI, pp. 6-7, 32. Further, just prior to making his comment about inconsistency the judge stated:

> "Then, I'll tell you, gentlemen, I have looked at this and looked at it, and I don't see anything for the Court to do in keeping with my oath, as busy as we are, except just to order the whole thing retried.
>
> I'm going to grant you a new trial on all issues. Now, we might be able to clean the issues up a little bit more. That will reopen discovery and maybe have another pretrial, but I guess that jury either was confused or they didn't understand the instructions. Or they were confused on what the evidence was." App. J.

A second jury trial began on February 11, 1985, before the same trial judge. On February 19, 1985, the jury returned a verdict finding only in favor of Diamond Shamrock on its claim against Zinke & Trumbo for the full amount of Zinke & Trumbo's share of unpaid well costs in the amount of $220,830.34. Exhibit"A" of App. C. The jury in the second trial, following the trial court's instructions, filled in the blanks on the verdict form pertaining to Diamond Shamrock's claim and did not fill in the blanks pertaining to any of the counterclaims.

Thereafter, Respondents filed a Motion to Reinstate the Original Verdict rendered in the case. In the alternative, they sought a new trial, alleging that the verdict rendered in the second trial was defective. The trial court denied both motions.

Diamond Shamrock filed a Motion for Judgment with respect to Hamilton and Francis' claims for breach of the implied covenants to market and to protect against drainage. The trial court denied Diamond Shamrock's Motion and granted a new trial on its own motion on those two claims, finding that the jury failed to return a verdict on those claims. App. B. The trial court entered a final judgment in favor of Diamond Shamrock on all other claims. App. C.

Proceedings Below—Introduction.

On April 18, 1985 the trial court entered an interlocutory order and a final judgment, disposing of the parties' claims as follows. The trial court:

1. on its own motion granted a new trial on Hamilton and Francis' counterclaim for breach of the implied covenant to market (App. B);

2. on its own motion granted a new trial on Hamilton and Francis' counterclaim for breach of implied covenant to protect against drainage (App. B);

3. entered judgment on the jury's verdict in favor of Diamond Shamrock on its claim for unpaid well costs and against Zinke & Trumbo in the amount of $220,830.34 (App. C);

4. entered judgment on the jury's verdict in favor of Diamond Shamrock on Zinke & Trumbo's counterclaim for gross negligence (App. C); and

5. entered judgment on the jury's verdict in favor of Diamond Shamrock on Hamilton, Francis and Richardson's counterclaim for negligence (App. C).

The trial court certified its interlocutory order granting a new trial on its own motion on Hamilton and Francis' counterclaims for breach of the implied covenants (Paragraphs 1 and 2 above) for immediate appeal pursuant to 28 U.S.C. §1292(b). App.B. That certified interlocutory order is the subject of the appeal below and of this Petition.

The trial court also certified its judgment on all other claims (Paragraphs 3 through 5 above) as final pursuant to Fed. R. Civ. P. 54(b). App. C. The final judgment on the claims described in Paragraphs 3 through 5 above is the subject of a separate appeal which is still pending before the Tenth Circuit.[2]

The only claims involved in the appeal below were the counterclaims of Hamilton and Francis for breach of the implied covenants. However, because the Tenth Circuit decided issues raised and briefed only in the separate appeal from the final judgment on all other claims, it is necessary to briefly describe how the issues arose in both appeals.

Proceedings Below—Appeal From Certified Interlocutory Order.

Diamond Shamrock filed a Petition for Permission to Appeal the certified interlocutory order which is the subject of the appeal below in the Court of Appeals pursuant to 28 U.S.C. §1292(b). App. K. Diamond Shamrock raised issues pertaining to the trial court's granting of a new

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[2] The last brief on the merits of the appeal from the final judgment was filed on May 22, 1986, the day after the Court of Appeals issued its Opinion in the appeal below from the certified interlocutory order. In a letter dated June 9,1986, the Court of Appeals in that separate appeal from the final judgment requested the parties to respond to the following questions: (1) whether oral argument is necessary, and (2) what effect if any, the Tenth Circuit Court of Appeals' decision in the appeal from the interlocutory order had on the appeal from the final judgment. Both parties filed responses. No further action has been taken by the Tenth Circuit Court of Appeals in that appeal and it is still pending.

trial on its own motion after the second trial on Hamilton and Francis' claims for breach of the implied covenants to market and to protect against drainage and the denial of Diamond Shamrock's Motion for Judgment on those claims.

Hamilton and Francis also filed a Petition for Permission to Appeal the certified interlocutory order, raising as their sole issue the trial court's alleged error in granting a new trial after the first trial on their counterclaim for breach of the implied covenant to protect against drainage. App. M. Hamilton and Francis also stated in their Petition for Permission to Appeal that: "Included in said Certified Interlocutory Order is the Order sought to be appealed hereby, to wit, the Order of the District Court entered January 11, 1984, granting a new trial with respect to counterclaimants' claim for drainage." App. M.

The court of appeals granted both Petitions for Permission to Appeal. In Hamilton and Francis' Docketing Statement they again asserted, as their sole issue, the trial court's alleged error in granting a new trial after the first trial on their counterclaims for breach of implied covenants. App. N.

In their Answer Brief, however, Hamilton, Francis and Richardson, addressed the issue of whether the trial court erred in granting a new trial after the first trial on their counterclaim of negligence. Diamond Shamrock responded by stating that the granting of a new trial after the first trial on the negligence claim was not decided by the interlocutory order, but was properly raised only in the separate appeal from the final judgment on that claim.

Separate Appeal From Final Judgment.

As discussed above, the trial court certified as final its judgment in favor of Diamond Shamrock on all claims except Hamilton and Francis' counterclaims for breach of implied covenants. In its Rule 54(b) certification, the trial

court stated that the claims certified as final were "separate, distinct and independent from" Hamilton and Francis' counterclaims for breach of the implied covenants.

All Respondents filed a separate appeal from that final judgment. App. O. Diamond Shamrock filed a cross-appeal. App. P. That appeal is still pending before the Court of Appeals.

In the appeal from the final judgment, all parties briefed the issue of whether the trial court erred in granting a new trial (after the first trial) with respect to Diamond Shamrock's claim for well costs and with respect to Zinke & Trumbo's counterclaim for gross negligence and Hamilton, Francis and Richardson's counterclaim for negligence.

Decision Below.

On May 21, 1986, a panel of the Court of Appeals for the Tenth Circuit issued its opinion in the appeal from the certified interlocutory order, reversing the trial court's order granting a new trial after the first trial and remanding the case with instructions that the district court reinstate the verdict of the jury returned at the first trial on all claims and enter judgment thereon. App. A. In its opinion, the Court of Appeals stated that the appeal was from a judgment containing an interlocutory order certified pursuant to Fed. R. Civ. P. 54(b). The court also stated that jurisdiction vested pursuant to 28 U.S.C. §1292(b).

The principal opinion (Barrett, C.J.) holds that the verdict in the first trial came within the provisions of Fed. R. Civ. P. 49(b) and that Diamond Shamrock waived any error in that verdict by failing to object on the grounds of inconsistency prior to the time the jury was discharged. The principal opinion finds that such waiver is dispositive of that appeal as well as the pending appeal from the final

judgment. Respondents raised the issue of waiver for the first time in their briefs on appeal.[3]

The principal opinion also holds that the trial court erred in finding that the jury's verdict was inconsistent. The Court of Appeals states that the trial court entered its order granting a new trial after the first trial based upon Diamond Shamrock's Motion for New Trial. The Court of Appeals held that the verdict was not inconsistent. The Court of Appeals did not address any other ground raised by Diamond Shamrock in its Motion for New Trial, nor did it address any of the grounds raised by Diamond Shamrock in support of its Motion for Judgment Notwithstanding the Verdict.

One of the panel members (McKay, C.J.) dissented from that portion of the opinion which found that the verdict was submitted under Fed. R. Civ. P.49(b) and that Diamond Shamrock waived any inconsistency in the verdict, but concurred in the result reached. The third panel member (Tacha, C.J.) concurred in the portion of the court's opinion that found that the verdict was not inconsistent and stated that it was unnecessary to reach the Rule 49 question.

Diamond Shamrock's Petition for Rehearing and a Suggestion for Rehearing *en banc*, were denied by the Court of Appeals on July 16, 1986. App. F and G. In its order denying rehearing, the Court of Appeals, for the first time, addressed one of the issues raised by Diamond Shamrock in support of its entitlement to judgment notwithstanding the verdict, to-wit, the failure to make demand to comply

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[3] Respondents did not raise the issue of waiver (1) in their Brief in Opposition to Diamond Shamrock's Alternative Motion for Judgment Notwithstanding the Verdict filed after the first trial, (2) at the hearing held on Diamond Shamrock's Motion for New Trial after the first trial, (3) in their Motion to Reconsider the decision to grant a new trial filed after the first trial, or (4) in their Motion to Partially Reinstate the Original Verdict filed after the second trial.

with the implied covenants. The Court of Appeals stated that Oklahoma law does not require "demand for payment" as a prerequisite to filing a suit for damages.[4] App. F and G.

REASONS FOR GRANTING THE WRIT

I. a. The Tenth Circuit's Decision that a Verdict Not Accompanied With Special Interrogatories Falls Within Fed. R. Civ. P. 49(b) and that a Party Waives Inconsistency in Such a Verdict is in Direct Conflict With Decisions of Other Circuits and Raises a Recurring and Important Question of Procedure Concerning Fed. R. Civ. P. 49.

The verdict form in this case allowed the jury to find for or against the parties on each claim submitted to the jury and to fill in a dollar amount of damages with respect to each claim. No special interrogatories were submitted along with the verdict form. App. H. The Tenth Circuit has extended the coverage of Fed. R. Civ. P. 49(b) beyond its express provisions to verdicts which are not accompanied by any special interrogatories. The Tenth Circuit, in extending the rule beyond its provisions, has upset a trial court's order granting a new trial by applying the harsh rule of waiver.

The Tenth Circuit's decision is in direct conflict with decision of the Fifth Circuit in *Mercer v. Long Mfg. N.C., Inc.*[5] In *Mercer*, the Fifth Circuit considered a verdict which

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[4] Diamond Shamrock stated as one of its grounds for Suggestion for Rehearing In Banc that the issue of whether demand is a prerequisite to recovery of damages for breach of implied covenants of an oil and gas lease had been certified to the Oklahoma Supreme Court by the United States District Court for the Western District of Oklahoma by Order dated April 18, 1985, in the case of *Wilda Fern Good, et al. v. Union Oil Co. of California et al.*, Case No. 64,384, before the Oklahoma Supreme Court.)

[5] 665 F.2d 61 (5th Cir. 1982) and 671 F.2d 946 (5th Cir. 1982) (rehearing denied).

allowed the jury to find for either party on three claims asserted by the plaintiff and to fill in the amount of damages,[6] and the effect of Fed. R. Civ. P.49 upon the verdict. The court held that the jury's verdict was inconsistent and remanded the case for a new trial. In a subsequent opinion denying rehearing in the same case, the Fifth Circuit held that a party does not waive inconsistency in that type of a verdict by failing to object prior to the discharge of the jury. In so doing, the Fifth Circuit stated that there is no sound reason to predicate the right to review on such a formality.

Equally in conflict with the decision below is *Malley-Duff &Associates, Inc. v. Crown Life Insurance Co.*,[7] wherein the Third Circuit expressly held that a verdict which allowed the jury to find whether a defendant was liable or not liable on each of several claims and to fill in an amount of damages if they found for the plaintiff, did not fall within the provisions of Rule 49(b). The court held that Rule 49(b) only pertained to general verdicts accompanied by answers to interrogatories. The court also held that a party does not waive the right to assert that the verdict was inconsistent by failing to object to the verdict prior to the time the jury is discharged.[8]

In *Ladnier v. Murray*,[9] the Fourth Circuit expressly held that a party did not waive inconsistency in a jury's verdict rendered under Rule 49(a) by failing to object prior to discharge of the jury.[10] This same result was reached by

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[6] 665 F.2d 61, 64 n.8.

[7] 734 F.2d 133, 144 n.3 and 145 (3rd Cir. 1984), *cert. den.*, 105 S. Ct. 564, 83 L. Ed.2d 505, 53 U.S.L.W. 3417 (1984).

[8] *Id.* at pp. 144-45.

[9] 769 F.2d 195, 198 n.3 (4th Cir. 1985).

[10] *See also, Brunner v. Maritime Overseas Corp.*, 779 F.2d 296(5th Cir. 1986), *cert. den.*, 106 S. Ct. 1971, 90 L. Ed.2d 655, 54 U.S.L.W. 3761 (1986); *Fugitt v. Jones*, 549 F.2d 1001 (5th Cir. 1977) (wherein

the Eleventh Circuit, without expressly discussing waiver, in *Burger King Corp. v. Mason.*[11] There, the Eleventh Circuit affirmed the trial court's granting of a new trial and addressed the issue of inconsistency of the verdict even though the parties did not request that the issue be resubmitted to the jury for clarification and, as a result, the jury was discharged without the opportunity to correct the inconsistencies, "leaving the district court with the difficult task of interpreting the verdict."[12]

The verdict in the instant case was in the same format as the verdicts involved in *Mercer* and *Malley-Duff.* The Fifth Circuit and the Third Circuit held in those cases that such a verdict was a special verdict falling within the provisions of Fed. R. Civ. P. 49(a) and that the rule of waiver applied by courts to verdicts under Fed. R. Civ. P. 49(b) did not apply to special verdicts. The Tenth Circuit's decision is in direct conflict with those decisions. If the verdict in this case is considered to be a general verdict on several claims, it does not fall within the provisions of Fed. R. Civ. P. 49(a) or (b), and the decision of the Tenth Circuit is in conflict in principle with decisions of other circuits which hold that a new trial is mandatory if general verdicts are inconsistent.[13] It is also inconsistent

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the Court stated that inconsistencies in the jury's verdict did not even need to be raised in a motion for new trial or a motion for judgment notwithstanding the verdict, but could be addressed when raised for the first time on appeal).

[11] 710 F.2d 1480 (11th Cir. 1983), *reh. den.*, 718 F.2d 115 (11th Cir. 1983), *cert. den.*, 465 U.S. 1102, 104 S. Ct. 1599, 80 L. Ed.2d 130 (1984).

[12] *Id.* at 1488.

[13] *Hopkins v. Coen*, 431 F.2d 1055, 1059 (6th Cir. 1970); *Wood v. Holiday Inns, Inc.*, 508 F.2d 167 (5th Cir. 1975); *Werner v. Upjohn Co.*, 628 F.2d 848, 860 (4th Cir. 1980), *cert. den.*, 449 U.S. 1080, 101 S. Ct. 862, 66 L. Ed.2d 804 (1981); *Turner v. "The Cabins," Tanker, Inc.*, 327 F. Supp.515, 519 (D.C. Del. 1971); *McCormick v. City of Wildwood*, 439 F. Supp. 769, 774 (D.C. N.J. 1977). *See also, Cheney*

with a decision of the Sixth Circuit holding that a motion for new trial is sufficient to raise an objection to the inconsistency between general verdicts.[14]

There are several reasons for not applying the harsh rule of waiver of the right to assert that a special verdict, or general verdicts not accompanied by special interrogatories, is inconsistent by failure to object prior to the time the jury is discharged. The use of special interrogatories under Fed. R. Civ. P. 49(b) puts counsel on notice that the provisions of that rule apply.[15] Rule 49(b) explicitly authorizes the court to return the jury for further consideration of its verdict if it is inconsistent, while Rule 49(a) contains no similar provision.[16] The judge has three choices under the provisions of Fed. R. Civ. P. 49(b) if there are inconsistencies between the answers to special interrogatories and the general verdict: (1) the court may enter judgment pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, (2) the court may return the jury for further consideration of its answer and verdict, or (3) the court may order a new trial.

Rule 49(a) does not expressly provide for these options. With regard to general verdicts which do not fall within Rule 49, there is no procedural rule which requires counsel to object before the time the jury is discharged. The Tenth

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v. Moler, 285 F.2d 116, 118 (10th Cir. 1960) (wherein the court held that a party does not waive error by failing to object to inconsistencies in general verdicts rendered in the same case by failing to object prior to discharge of the jury).

[14] *Pugh v. Bluff City Excursion Co.*, 177 F. 399 (6th Cir. 1910).

[15] *Fernandez v. Chardon*, 681 F.2d 42, 58 (1st Cir. 1982), *aff'd., Chardon v. Fumero Soto*, 462 U.S. 650, 103 S. Ct. 2611, 77 L. Ed.2d 74 (1983).

[16] *Malley-Duff & Associates, Inc. v. Crown Life Insurance Co.*, 734 F.2d 133 (3rd Cir. 1984), *cert. den.*, 105 S. Ct. 564, 83L. Ed.2d 505, 63 U.S.L.W. 3417 (1984); *Griffin v. Matherne*, 471 F.2d 911, 918 n.6 (5th Cir. 1973), *reh. den.*, 474 F.2d 1347 (5th Cir. 1973).

Circuit's judicial expansion of Fed. R. Civ. P. 49(b) operates to penalize a party by invoking the harsh rule of waiver to overturn a trial court's order granting a new trial.

Fed. R. Civ. P. 59 allows a trial court to grant a new trial for any of the reasons which pertained at common law. An inconsistency in the jury's general verdicts is recognized as a ground for granting a new trial at common law.[17] Under Fed. R.Civ. P. 59, counsel has 10 days within which to file a motion for new trial, which gives counsel time to think of all grounds which support the granting of a new trial. Under Fed. R. Civ. P. 49(b), where a jury is requested to answer specific factual findings, the inconsistencies are more likely to be obvious. This is not the case with a general verdict or special verdicts under 49(a).[18]

The Tenth Circuit, by extending coverage of Rule 49(b) to encompass verdicts which are not accompanied by any special interrogatories, has created confusing precedent. It is a precedent directly at odds with decisions of the Third and Fifth Circuits. Further, the issue of waiver of the inconsistencies in a jury's civil verdict is a recurring and

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[17] *Global Van Lines, Inc. v. Nebeker*, 541 F.2d 865, 868 (10th Cir. 1976); *Hopkins v. Coen*, 431 F.2d 1055, 1059 (6th Cir. 1970); 6A *Moore's Federal Practice*, Para. 59.08[1] at p. 59-81 (1985); *Burkett v. Moran*, 410 P.2d 876 (Okl. 1965).

[18] *Alverez v. J. Ray McDermott & Co.*, 674 F.2d 1037, 1041 n.2 (5th Cir. 1982) (wherein the Court stated: "In the instant case, the inconsistencies in the special interrogatories . . . in light of the Court's general charge, were not so blatant that the parties would have immediately perceived while the jury was present that a judgment could not be entered upon them); *Guidry v. Kem Mfg. Co.*, 598 F.2d 402, 405 n.2 (5th Cir. 1979), *reh. den.*, 604 F.2d 320 (5th Cir. 1979), *cert. den.*, 445 U.S. 929, 100 S. Ct. 1318, 63 L.Ed.2d 1318 (1980) (wherein the Fifth Circuit speculated that counsel did not request resubmission of the verdict to the jury perhaps because the "$1.5 million eruption so stunned them that their reactions were slowed." Nevertheless, the Court remanded the case for new trial because of inconsistency in the jury's special verdict).

important question and a writ of certiorari should be granted to provide guidance to lower courts. Rule 49(b) is specific and does not apply to the verdict involved in this case. The Tenth Circuit's application of the doctrine of waiver makes clients' substantial rights in cases being tried in the federal courts every day dependent upon their counsel's split second decisions to be made before the jury is discharged as to whether the verdict is inconsistent and whether the circuit he is before applies the rule of waiver.

b. The Tenth Circuit's Reversal of the Trial Court's Order Granting a New Trial is in Direct Conflict With a Decision of the Seventh Circuit and is in Conflict With Established Case Law Holding that the Trial Court Has Broad Discretion in Granting a New Trial.

Diamond Shamrock's Motion for New Trial was based on several grounds. App. I. The trial court granted Diamond Shamrock's Motion in all respects. App. D.

The Tenth Circuit, by reversing the trial court's order granting a new trial, has infringed upon the trial court's broad discretion in granting a new trial. Even if the Tenth Circuit was correct in applying Fed. R. Civ. P. 49(b) to a situation where it does not apply, the trial court nevertheless had the discretion to grant a new trial for inconsistency of the verdict, especially where the opposing party did not raise the issue of waiver before the trial court.

The Tenth Circuit's opinion is in direct conflict with *Cundiff v. Washburn.*[19] In *Cundiff*, the Seventh Circuit held that, in the absence of objection by counsel, the trial court alone has the discretion to choose the means of correcting the inconsistency of the verdict under Fed. R. Civ. P. 49(b), which includes the option of granting a new trial.[20]

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[19] 393 F.2d 505 (7th Cir. 1968).

[20] *Id.* at 507.

In each of the cases relied upon by the Tenth Circuit in the principal opinion, the appellate court *affirmed* the trial court's refusal to grant a new trial. Appellate courts have held that even where a trial court would have been justified in granting a new trial because a verdict was inconsistent, they would not disturb the trial court's decision on appeal.[21] This result is consistent with the general rule that because the trial judge has first hand knowledge of the case, the trial judge is in the best position to pass upon the question of a new trial in light of the evidence and the charges to the jury.[22]

The Tenth Circuit's decision also infringes upon the trial court's discretion by assuming that the sole basis that the trial court granted a new trial was because of inconsistency of the jury's verdict and by holding that the jury's verdict was not inconsistent. The granting of a new trial is not in derogation of the right to a trial by jury, but is one of the historic safeguards of that right.[23] The trial court may order a new trial on its own motion under Fed. R. Civ. P.59(d) if it suspects that the jury verdict reflects confusion, and that decision can only be reversed for a clear abuse of discretion.[24] In *Schneider v. Lockheed Aircraft Corp.*,[25] the court held that the trial court has the discretion to grant a new trial when the jury is confused. The court further held that the appellate court's failure

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[21] *International Longshoremen's & Warehousemen's Union v. Hawaiian Pineapple Co.*, 226 F.2d 875, 881 (9th Cir. 1955), *cert. den.*, 351 U.S. 963, 76 S. Ct. 1026, 100 L. Ed. 1483 (1956); *Lansburgh & Bro., Inc. v. Clark*, 75 App. D.C. 339,127 F.2d 331, 333 (1942).

[22] *Iacurci v. Lummus Co.*, 387 U.S. 86, 88, 87 S. Ct. 1843, 18 L. Ed.2d 581 (1967).

[23] *Aetna Casualty & Surety Co. v. Yeatts*, 122 F.2d 350, 353-54(4th Cir. 1941); *Holmes v. Wack*, 464 F.2d 86, 88 n.1 (10th Cir. 1972).

[24] *Nissho-Iwai Co. v. Occidental Crude Sales, Inc.*, 729 F.2d '1530, 1538 (5th Cir. 1984).

[25] 212 App. D.C. 87, 658 F.2d 835, 849-50 (1981).

to find confusion is not dispositive because (1) the trial judge is in the best position to observe the trial and (2) the scope of review is narrow.

In the instant case, Diamond Shamrock asserted several grounds which would support judgment notwithstanding the verdict or new trial. App. I. The trial court had the power to grant a new trial because of insufficiency of the evidence even where it denied a motion for judgment notwithstanding the verdict under Fed. R. Civ. P. 50(b). The order granting a new trial stated that it granted Diamond Shamrock's Motion for New Trial "in all respects." That order controls.[26] In *Community National Life Insurance Co. v. Parker Square Savings & Loan Association*,[27] the judge stated that: "I don't know why except that I was just not satisfied."[28] The Seventh Circuit sustained the order granting a new trial, pointing out that the motion for new trial was based on eight specific grounds and the order granting the new trial recited that the order was based upon the grounds stated in the motion.

The Tenth Circuit also infringed upon the trial court's discretion by holding that the jury's verdict was not irreconcilably inconsistent. If, after a review of the record, the jury's answers may not "fairly be said to represent a logical and probable decision on the relevant issues as submitted," the jury's verdict is inconsistent and a new trial should be granted.[29] Even though the verdict may not appear inconsistent on the surface, it may become so in

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[26] *Segars v. Atlantic Coast Line Railroad Co.*, 286 F.2d 767,770 (4th Cir. 1961); *Gay v. United States*, 118 F.2d 160, 161 (7th Cir. 1941).

[27] 406 F.2d 603 (10th Cir. 1969).

[28] *Id.* at 605.

[29] *Fugitt v. Jones*, 549 F.2d 1001, 1005 (5th Cir. 1977); *Griffin v. Matherne*, 471 F.2d 911, 915 (5th Cir. 1973), *reh. den.*, 474 F.2d 1347 (5th Cir. 1973); *Burger King Corp. v. Mason*, 710 F.2d 1480, 1489 (11th Cir. 1983), *reh. den.*, 718 F.2d 1115 (11th Cir. 1983), *cert. den.*, 465 U.S. 1102, 104S. Ct. 1599, 80 L. Ed.2d 130 (1984).

light of the instructions,[30] which the jury is assumed to act in accordance with.[31]

Under the evidence and instructions in this case, the jury was required to find that Diamond Shamrock incurred the well costs in a good and workmanlike manner in order to find for Diamond Shamrock on its claim for recovery of such well costs. Under the instructions and the evidence at the first trial, Respondents were entitled to recover damages on their claims of negligence and gross negligence only if Diamond Shamrock failed to prudently conduct the identical operations. The jury's verdict in favor of Diamond Shamrock at the first trial was a finding that Diamond Shamrock incurred the completion costs in a good and workmanlike manner. That finding cannot be reconciled with the jury's findings in favor of Respondents that Diamond Shamrock was negligent and grossly negligent in the same operations for which Diamond Shamrock sought to recover costs.

The Tenth Circuit, relying on a statement made by Zinke in his cross examination, states that the jury could have believed that Diamond Shamrock was entitled to recover well costs even if they were negligently or grossly negligently incurred. Zinke merely testified that the non-operator, under the accounting procedures attached to the operating agreement, was required to pay its bills within 15 days of receipt from the operator. Zinke stated that the payment of well costs under that requirement would not be excused merely because he decided on his own that the operator was negligent. That requirement does not support a finding that Zinke & Trumbo were liable for such costs no matter how negligently incurred. Indeed, under the operating agreement, Diamond Shamrock could

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[30] *Mercer v. Long Mfg. N.C., Inc.*, 665 F.2d 61, 66 (5th Cir. 1982), *reh. den.*, 671 F.2d 946 (5th Cir. 1982).

[31] *City of Los Angeles v. Heller*, 475 U.S. ____, 106 S. Ct. 1571, 89 L. Ed.2d 806, 54 U.S.L.W. 3693 (1986).

have required Zinke & Trumbo to pay their share of estimated well costs before the expenditures were even incurred.

The Tenth Circuit's holding is contrary to the principles set forth by this Court that "juries act in accordance with instructions given them and that they do not consider and base their decisions on legal questions with respect to which they are not charged."[32] The extent to which the Tenth Circuit infringed upon the trial court's broad discretionary powers in this case merits this court's attention.

II. The Tenth Circuit, by Deciding Issues Properly Raised and Fully Briefed Only in a Separate Appeal and by Failing to Decide Issues Raised on Appeal Pertaining to Diamond Shamrock's Entitlement to Judgment Notwithstanding the Verdict, has so far Departed From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of this Court's Power of Supervision.

The Tenth Circuit reinstated a multi-million dollar verdict in this case on the ground of a procedural technicality, without even addressing issues which were raised by Diamond Shamrock and supported by authorities and citations to the record. The Tenth Circuit misunderstood the procedural history and issues involved in this case. The Tenth Circuit's confusion is shown by its statement that this appeal was from a final judgment, containing an interlocutory order, certified under Fed. R. Civ. P. 54(b). App. A. This appeal was from an interlocutory order certified under 28 U.S.C. §1292(b).

The only two claims involved in the interlocutory appeal below were Hamilton and Francis' claim for breach of the implied covenants to protect against drainage and to market. The order granting a new trial after the first trial

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[32] *City of Los Angeles v. Heller*, 475 U.S. ____, 106 S. Ct. 1571, 89 L. Ed.2d 806, 810, 54 U.S.L.W. 3693 (1986).

was reviewable in the appeal below only with respect to the two implied covenant claims.[33]

A final judgment was rendered after the second trial in favor of Diamond Shamrock on all claims other than Hamilton and Francis' claims for breach of implied covenants. That judgment was certified under Fed. R. Civ. P. 54(b) and is the subject of a separate appeal still pending before the Tenth Circuit. The propriety of the interlocutory order granting a new trial after the first trial on all claims upon which the final judgment was rendered is subject to review as part of the separate appeal from that final judgment.[34] However, the Tenth Circuit in its decision below addressed issues which were fully briefed only in the separate appeals.

The Tenth Circuit's confusion is also evidenced by its statement that Diamond Shamrock's Motion for New Trial after the first trial was based on inconsistency of the jury's verdict and that the sole issue dispositive of the appeal was waiver of the right to assert inconsistency of the jury's verdict. Diamond Shamrock never asserted that the jury's verdict on the two implied covenant counterclaims of Hamilton and Francis were inconsistent with the jury's verdict on the remaining claims. Although Diamond Shamrock asserted several grounds in support of its Alternative Motion for Judgment Notwithstanding the Verdict or New Trial with respect to Hamilton and Francis' implied covenant claims, none of those grounds was based on inconsistency of the jury's verdict with regard to Hamilton and Francis' claims for breach of the implied covenants. The Tenth Circuit's opinion is thus contrary to the trial court's order granting a new trial on the implied covenant claims after the first trial.

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[33] *United States v. Ft. Sill Apache Tribe of the State of Oklahoma*, 205 Ct. Cl. 805, 507 F.2d 861, 864 (1974).

[34] *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36, 101S. Ct. 188, 66 L. Ed.2d 193 (1980).

Diamond Shamrock asserted in the trial court and on appeal that there was no evidence to support certain essential elements of all of Respondents' counterclaims. To reinstate the jury's verdict without even addressing those issues is arbitrary and contrary to rational justice.[35] A judgment supported by no evidence on an essential element violates due process.[36]

With respect to the interlocutory order granting a new trial on Hamilton and Francis' implied covenant claims, Diamond Shamrock pointed out there was no evidence to support the essential elements of those claims. Hamilton and Francis did not testify. Neither the oil and gas leases nor their terms were introduced into evidence. Under Oklahoma law, implied covenants are implied in fact from the express terms of the oil and gas lease.[37] To construe an oil and gas lease, the court is required to determine the parties' intent as manifested by the express provisions of the contract.[38] An implied covenant may only be implied where the express provisions of an oil and gas lease do not provide otherwise.[39] Further, it is a well-settled prin-

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[35] *Interstate Commerce Commission v. Louisville & Nashville R.R. Co.*, 227 U.S. 88, 33 S. Ct. 185, 57 L. Ed. 431 (1913).

[36] *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 304 n.55 (3rd Cir. 1983), *later proc.*, 723 F.2d319 (3rd Cir. 1983), *rev'd. on other grds., Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, ___ U. S. ___, 106 S. Ct. 1348, 89 L. Ed.2d 538, 54 U.S.L.W. 4319 (1986); *Thompson v. City of Louisville*, 362 U.S. 199, 206,80 S. Ct. 624, 4 L. Ed.2d 654 (1960).

[37] *Indian Territory Illuminating Oil Co. v. Rosamond*, 190 Okl. 46, 120 P.2d 349 (1941).

[38] *Farmers' Mutual Oil Leasing Co. v. Bonneau*, 110 Okl. 168,237 P. 83, 84 (1924); *State ex rel. Commissioners of the Land Office v. Couch*, 298 P.2d 452 (Okl. 1956).

[39] *Adkins v. Adams*, 152 F.2d 489 (7th Cir. 1945); *Brimmer v. Union Oil Co. of California*, 81 F.2d 437, 440 (10th Cir. 1936), *cert. den.*, 298 U.S. 668, 56 S. Ct. 833, 80 L. Ed. 1391 (1936); *Witt v. Westheimer*, 182 Okl. 645, 79 P.2d 250(1938).

ciple of law that, in an action for damages for breach of contract, the contract or its terms and conditions must be in evidence and the plaintiff has the burden of proving such terms.[40]

Further, demand to comply with the implied covenants was an essential element of Hamilton and Francis' claims for breach of implied covenants under the Instructions to the jury. R., Vol. I, pp. 264-67. It was undisputed that no demand was made. It was pointed out to the Tenth Circuit that this issue has been certified to the Oklahoma Supreme Court by the United States District Court for the Western District of Oklahoma. The Oklahoma Supreme Court is expected to rule on this issue at any time. It is Diamond Shamrock's position that such demand is necessary.[41]

Diamond Shamrock also pointed out that Hamilton and Francis failed to prove the essential element that Diamond Shamrock failed to act as a prudent operator in drilling the John Hamilton No. 1-33 Well. Diamond Shamrock also asserted that there was absolutely no evidence of the essential elements of substantial drainage and damages. Finally, Diamond Shamrock pointed out there was absolutely no evidence to support the award of $1,000,000.00 punitive damages for breach of the implied covenant to protect against drainage.

The Tenth Circuit abdicated its responsibilities by failing to address the issues raised by Diamond Shamrock. A writ should be granted because the Tenth Circuit drastically departed from the usual course of judicial review in reversing the trial court by deciding issues involved only in

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[40] *National Surety Co. v. Board of Education of City of Hugo*, 36 Okl. 569, 129 P. 25, 27 (1912); *Bell v. Ralston Purina Co.*, 257 F.2d 31 (10th Cir. 1958).

[41] *Plains Petroleum Corp. v. Fine*, 174 Okl. 570, 51 P.2d 284(1935); *Spaeth v. Union Oil Co. of California*, 710 F.2d 1455, 1458 (10th Cir. 1983), *later app.*, 762 F.2d 865 (10th Cir. 1985), *cert. den.*, ___ U.S. ___, 106 S. Ct. 1946, 90 L. Ed.2d 356, 54 U.S.L.W. 3729 (1986).

a separate appeal and by failing to address issues not waived by Diamond Shamrock, resulting in the reinstatement of a multi-million dollar verdict not supported by the evidence.

CONCLUSION

For these various reasons, this petition for certiorari should be granted. If the Petitioner is correct in urging that the Tenth Circuit erred, the matter should be remanded to the Tenth Circuit for consideration of the errors raised with respect to the Order granting new trial after the second jury trial.

Respectfully submitted,

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